

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MAY 6 1969

SAMUEL REISMAN and
JOSEPH J. BYRNES,

See Vol. 3447

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

FILED

APR 23 1969

WILLIAM B. BYRNE, JR.

PETITION FOR REHEARING
AND
SUGGESTION FOR REHEARING EN BANC

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

WM. MATTHEW BYRNE, JR.
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TOPICAL INDEX

	<u>Page</u>
Table of Authorities	ii
FOUNDATIONS FOR GRANTING A REHEARING	1
1. THE DECISION REJECTS A FUNDAMENTAL RULE OF THE LAW OF AGENCY, AND CONFLICTS WITH DECISIONS IN THIS AND OTHER CIRCUITS	1
2. THE COURT HAS MISAPPREHENDED THE FACTS CONCERNING THE EFFECT OF THE COMPLAINT LETTERS	11

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Bailey v. Gulf Ins. Co. , 389 F. 2d 889 (10th Cir. 1968)	2
Benjamin v. United States, 328 F. 2d 854 (2nd Cir. 1964), cert. denied	10
Bimini Run, Ltd. v. Belcher Oil Co. , 336 F. 2d 184 (5th Cir. 1964)	1
Bowen v. Mount Vernon Savings Bank, 105 F. 2d 796 (D. C. Cir. 1939)	2, 7
Continental Cas. Co. v. United States, 337 F. 2d 602 (1st Cir. 1964)	1
Dawn Donut Co. v. Hart's Food Stores, Inc. , 267 F. 2d 358 (2nd Cir. 1959)	1
Dubuque Stone Products Co. v. Fred L. Gray Co. , 356 F. 2d 718 (8th Cir. 1966)	2
Earle Restaurant v. O'Meara, 160 F. 2d 275 (D. C. Cir. 1947)	2
Great American Indemnity Co. v. First National Bank, 100 F. 2d 763 (10th Cir. 1939)	2
Harris v. United States, 261 F. 2d 792 (9th Cir. 1958), cert. denied 360 U. S. 933	6
Higgins v. Shenango Pottery Co. , 256 F. 2d 504 (3rd Cir. 1958)	1
Howard v. United States, 377 U. S. 953	10
Irwin v. United States, 338 F. 2d 770 (9th Cir. 1964)	3
Kann v. United States, 323 U. S. 88 (1944)	6
Las Vegas Merchants Plumbers Association v. United States, 210 F. 2d 732 (9th Cir. 1954)	2

	<u>Page</u>
McSweeney v. Prudential Ins. Co. of America, 128 F.2d 660 (4th Cir. 1942), cert. denied 317 U.S. 658	1
Metz v. Tusico, Inc., 167 F.Supp. 393, aff'd 260 F.2d 957 (1st Cir. 1959)	1
Phillips v. United States, 356 F.2d 297 (9th Cir. 1965)	2, 10
Reistroffer v. United States, 258 F.2d 379 (8th Cir. 1958)	5
Schram v. Burt, 111 F.2d 557 (6th Cir. 1940)	1
Stone v. United States, 113 F.2d 70 (6th Cir. 1940)	9
Union Ins. Exchange, Inc. v. Gaul, 393 F.2d 151 (7th Cir. 1968)	1
United States v. Andreadis, 366 F.2d 423 (2nd Cir. 1966), cert. denied 385 U.S. 1001	10
United States for Use of Ascher Corp. v. Bradley-Dodson Co., 281 F.2d 676 (9th Cir. 1960)	2
United States v. Luros, 260 F.Supp. 697 (D.C.Ia. 1966), rev'd on other grounds, 389 F.2d 200 (6th Cir. 1968)	2
United States v. Press, 336 F.2d 1003 (2nd Cir. 1964)	3
Wagner Tractor, Inc. v. Shields, 381 F.2d 441 (9th Cir. 1967)	2
Wayne v. New York Life Ins. Co., 132 F.2d 28 (8th Cir. 1943)	2
Wong Sun v. United States, 371 U.S. 471 (1963)	2
Zweig v. Bethlehem Steel Supply Co., 186 F.2d 20 (5th Cir. 1951)	1

Federal Rules of Appellate Procedure:

Rule 40

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PETITION FOR REHEARING

TO THE HONORABLE JUDGES: Barnes, Hamley and
Browning of the United States Court of Appeals for the Ninth
Circuit.

Pursuant to Rule 40, Federal Rules of Appellate Procedure,
and this Court's Rule 12, appellee United States respectfully
petitions this Court for rehearing in the above-captioned cause,
and suggests a rehearing en banc.

Oral argument in this matter was heard before Circuit
Judges Stanley Barnes, Frederick G. Hamley, and James R.
Browning. The opinion and decision of this Court was filed on
April 9, 1969, and this petition is filed within the time provided
therefor by provision of Rule 40, Federal Rules of Appellate
Procedure.

GROUND S FOR GRANTING A REHEARING

1. THE DECISION REJECTS A FUNDAMENTAL
RULE OF THE LAW OF AGENCY, AND CON-
FLICTS WITH DECISIONS IN THIS AND
OTHER CIRCUITS
-

Every Court of Appeals in this country has stated and reaffirmed the principle that notice to an agent acting within the scope of his authority is notice to his principal.

Continental Cas. Co. v. United States,

337 F.2d 602 (1st Cir. 1964);

Metz v. Tusico, Inc. , 167 F.Supp. 393,

aff'd 260 F.2d 957 (1st Cir. 1959);

Dawn Donut Co. v. Hart's Food Stores, Inc. ,

267 F.2d 358 (2nd Cir. 1959);

Higgins v. Shenango Pottery Co. , 256 F.2d 504

(3d Cir. 1958);

McSweeney v. Prudential Ins. Co. of America,

128 F.2d 660 (4th Cir. 1942),

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(7th Cir. 1968);

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Dodson Co. , 281 F.2d 676 (9th Cir. 1960);

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(9th Cir. 1967);

Great American Indemnity Co. v. First National

Bank, 100 F.2d 763 (10th Cir. 1939);

Bailey v. Gulf Ins. Co. , 389 F.2d 889 (10th Cir. 1968);

Bowen v. Mount Vernon Savings Bank, 105 F.2d 796

(D. C. Cir. 1939);

Earle Restaurant v. O'Meara, 160 F.2d 275

(D. C. Cir. 1947).

Principals creating a criminal agency are bound by the same rules as are principals in civil cases.

Las Vegas Merchant Plumbers Association v. United

States, 210 F.2d 732 (9th Cir. 1954);

United States v. Lueros, 260 F.Supp. 697 (D. C. Ia.

1966); rev'd on other grounds, 389 F.2d 200

(6th Cir. 1968);

Wong Sun v. United States, 371 U.S. 471, 488-492

(1963).

The Court's decision herein, and the sole precedent for it, Phillips v. United States, 356 F.2d 297 (9th Cir. 1965), are in

conflict with every other reported case which touches on the issue involved. For example, in Irwin v. United States, 338 F.2d 770 (9th Cir. 1964), there was no evidence that defendant Irwin had personally read any complaint letters, but they were received against him, and this Court said of them:

"Complaints received by M. O. D. from franchise holders sometimes averaged fifteen per day. Franchise holders who sought refunds after the first expenditure of \$29.95 were usually told that there could be no refund until the franchise holder had made at least one purchase of the additional materials. Some purchasers were unable to obtain materials for which they had paid until after several prompting letters. Some franchise holders repeatedly asked M. O. D. for advice and assistance but received no reply." (p. 773)

The clearest case on the matter of complaint letters is United States v. Press, 336 F.2d 1003 (2d Cir. 1964), in which it was held that complaint letters were admissible against the defendants if they were received by their company, and were inadmissible only if they were not called to their company's attention. In the Press case, I. Press, Fry, L. Press, S. Stuchell and W. Stuchell were indicted for mail fraud along with three corporations, one of which was named "Buy-Rite." Evidence of numerous victim complaints was received at trial. Of these complaints, some were "called to Mrs. Stuchell's attention" (p. 1011) by trade association communications which merely summarized the nature of the complaints, and

some were processed by employees in "the two-man 'correspondence unit' " of Buy-Rite. So far as the proof showed, none were actually seen by any of the appealing defendants. The Court of Appeals upheld the admissibility of the complaint evidence received by "Buy-Rite" on the ground that it had been called to the defendant's attention, stating:

"Of course, evidence that complaints had been received would not have been admissible to show that members had, in fact not received catalogs, merchandise or refunds. But evidence that there had been complaints which were called to appellants' attention was relevant on the issue of appellants' intent and good faith. The inference might readily be drawn that, since appellants knew that members were being misled by solicitation literature and that there was general dissatisfaction with the manner in which Buy-Rite conducted its affairs, continued operation despite this knowledge showed the existence of a scheme to defraud." [emphasis added] (p. 1011)

* * *

"The some 200 complaints received prior to the end of 1961 were sufficient to put defendants on notice that their representations were being so interpreted as to make them misrepresentations." [emphasis added] (p. 1012)

In pointing out the inadmissibility against the defendants of

complaints not called to their company's attention, the court said:

"Reference of witnesses to complaints that were not brought to appellants' attention stand on a different footing. [FN³ "This category includes those complaints that Hicks did not call to Buy-Rite's attention; those that Hicks said were still being received at the time of trial . . . ; and those that were sent directly to Postal Authorities."] That there were member complaints in substantial volume which were called to Buy-Rite's attention was disclosed early in the trial" (p.1012)

* * *

"Because of the prominence of the complaints called to Buy-Rite's attention that were properly in evidence, the fact that there was mention of other complaints not specifically called to Buy-Rite's notice did not constitute error sufficiently prejudicial to demand reversal. . . . the number of complaints whose existence was not in some way brought to Buy-Rite's attention was so small in comparison to the number of which it was aware that any error could hardly have been prejudicial." [emphasis added] (p. 1013)

The reading and handling of complaints by some members of a common scheme is as much an act admissible against all, as any other activity. As was said in Reistroffer v. United States, 258 F.2d 379 (8th Cir. 1958), "we find no error in admitting the . . . subsequent correspondence showing the handling of

complaints, accusations and demands of purchasers to get their money back. The evidence tended to show the scheme in operation."

This Court holds that since complaints bear on the issue of intent, they are admissible only if it has been proved that each defendant "had actual knowledge of the documents," but gives no reason why complaints should be treated differently from other evidence bearing on intent, such as the receiving of payments, contents of advertising, and contents of lulling letters. That "personal knowledge" is not required for such "intent" items is clearly demonstrated by this Court's opinion in Harris v. United States, 261 F. 2d 792 (9th Cir. 1958), cert. den. 360 U S. 933, in which it was held:

"But the writings, literature, lead cards and lulling letters sent out by or under the direction of some of defendants and the manner of usage thereof were such that the jury had a right to consider these as evidence of bad faith and fraudulent intent upon the part of all defendants." [emphasis added] (p. 795)

Even with respect to proof of the essential element of the use of the mails, "personal knowledge" is not required. In Kann v. United States, 323 U.S. 88 (1944), the defendant claimed that he had no knowledge that certain checks would be sent through the mails. The Supreme Court said:

" . . . while there may be some question as to whether the defendants may be said to have 'caused' the mailing of the checks, we think it a fair inference that

those defendants who drew, or those who cashed, the checks believed that the banks which took them would mail them to the banks on which they were drawn, and, assuming the petitioner participated in the scheme, their knowledge was his knowledge." [emphasis added] (p. 93)

Since there is no rational distinction between complaint letters and other documents bearing on intent, the court should not abrogate the law of agency to create an exception for complaints. In fact such an exception can never be applied in prosecutions of corporations, and there is no reason why a corporation should be charged with the knowledge of its agents while an individual principal is excused therefrom, particularly since the latter may choose to act directly or through others, while the former has no choice at all.

The principles of agency, which provide the basis for the law of conspiracy and common scheme, are designed to prevent a principal from insulating himself from responsibility by obtaining agents to act for him. Bowen v. Mount Vernon Savings Bank, 105 F.2d 796 (D.C. Cir. 1939). This avoidance of responsibility is precisely what this Court's decision will not only permit, but encourage. Under the Court's new rule a principal has complete power to choose whether he will accept the required "personal knowledge" of complaints. Nothing the defrauded victim can do will bring such knowledge to a principal who declines to read the complaints sent to him. Take, for example, the undisputed facts concerning defendants Reisman

and Byrnes:

- (1) They and their co-defendants hired and paid the employees who handled the complaints;
- (2) They instructed employees on what procedures to follow when complaints were received, and discussed the complaints on an individual basis with them.
- (3) Reisman told employee Manzin to notify him of complaints as they came into the office and she did so.
- (4) They met with their co-defendants and decided how complaints and refund requests would be handled;
- (5) Both knew complaints received by the company were being handled by attorney Finell and attorney Ross and were furnished written lists of refunds made pending and denied;
- (6) Reisman knew that "the company received a flood of complaints;"
- (7) All complaint letters were readily available to Reisman and Byrnes in the company office which they frequented, and at the office of Reisman's suite-mate and friend, attorney Ross who was hired to answer the complaints;
- (8) Documentary evidence shows that Reisman and Byrnes personally read a number of the individual complaint letters. [See Appellee's Brief, pp. 53, 54 and the Appendix to this Petition]

In the face of the foregoing evidence that appellants had full knowledge that numerous purchaser complaints were being received, and that appellants had full opportunity to examine the letters if they chose, this Court finds that: "Direct proof of actual knowledge by the two appellants was limited to a scattered few complaint letters," and incorrectly states that "the jury was erroneously permitted to assume that each of the appellants had knowledge of numerous letters complaining of misrepresentations because such letters were found in the company files or were known to persons other than defendants connected with the enterprise." This can only mean that the Court is requiring personal knowledge of the words in each particular complaint before it can be admitted in evidence. Creators of fraudulent schemes will gladly avoid such enlightenment by simply declining to read the complaints about which they may otherwise be thoroughly informed, as the defendants obviously were in this case. The cultivation of ignorance as a means of avoiding incriminating knowledge has regularly been held to be ineffective. For example, in Stone v. United States, 113 F.2d 70 (6th Cir. 1940), it was said:

"Where guilty knowledge is an element in the offense, as in conspiracy charges and the use of the mails to defraud; the knowledge must be found from the evidence beyond a reasonable doubt, but actual knowledge is not required; it may be inferred. Scierter may be inferred where the lack of knowledge consists of ignorance of facts which any ordinary person under similar

other circuits. No reason has been suggested and none exists as to why complaints should be treated differently from other evidence of intent. Such an erroneous rule will promote fraud by insulating perpetrators from responsibility for their schemes.

2. THE COURT HAS MISAPPREHENDED THE
FACTS CONCERNING THE EFFECT OF THE
COMPLAINT LETTERS

In finding that admission of complaint letters was prejudicial error, the Court states that "there was little dispute as to the facts at trial" and that intent was the real contested issue. Actually, there was virtually no disagreement as to what the defendants intended. They intended to sell certain land by making certain representations. The "hotly contested" issue was the factual one of whether these representations were true or false as can be readily determined by reading the final argument of the defense counsel and prosecutor.

The Court also underscores the issue of intent by stating that the jury "required some thirty hours of deliberation, over a period of four days, to reach its verdict." In view of the fact that trial involved thirteen weeks of testimony from two hundred witnesses and literally thousands of exhibits, and that the jury had obviously reached its verdicts rapidly as to appellants, and spent most of its time deliberating the case of defendant Benaron on whom the jury was unable to agree, the Court's assumption is unfounded.

The Court says of the complaints that "Hundreds of them were admitted" and "the content of these letters was extremely damaging." This reflects an uncritical acceptance of defendant's brief. An examination of the exhibits themselves reveals this claim to be totally false. The total number of letters that can be considered "complaints" is less than two-hundred and fifty. Of these many simply ask for refunds or inquire about unfavorable publicity. Defendant Reisman's opening brief prints the strongest complaints available. These thirty-eight, and some of the others, state or suggest that the land was misrepresented to the purchasers in various ways. These statements are the only respect in which the letters could be considered at all "damaging". However, precisely the same complaints, in the same volume, were received in evidence apart from the complaint letters themselves. This is so because the complaint letters are not isolated documents, but are merely one document in a complaint file which contains other forms showing the nature of the complaints. For example, after a complaint letter was received, the company mailed a questionnaire to the purchaser. These completed questionnaires contain the same complaints as in the initial letters, and were seen by Reisman. [Ross, 11622]. Also, "Refund Request Control" sheets list the nature of the misrepresentations alleged by the complaining buyer. Thus, the complaint letters add nothing to other complaint evidence to which appellants have made no objection. Also, evidence of complaints of misrepresentations in sales was received in the form of: a Real Estate Commission

Order halting sales, a complaint letter from the Governor of Nevada, and a Location Analyst's report, to say nothing of the more than fifty purchasers who testified to their complaints about misrepresentation. Under these circumstances, the complaint letters were not only not "extremely damaging", but in fact were completely cumulative and harmless.

Respectfully submitted,

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APPENDIX

SAMUEL REISMAN

1 "I have discussed this with some
2 friends of mine before I bought the land
3 and since I purchased the land and they
4 as well as myself feel deeply that this
5 was misrepresentation on your behalf to
6 make this purchase therefore I wish to
7 cancel my contract with your corp." and so on.

8 The letter of Mr. Rockel of November 8,
9 1960, reads:

0 "This is to advise you that com-
1 plete refund has been made to Mr. Tex
2 D. Munson."

3 That is correct, is it?

4 A Yes.

5 Q With reference to these matters, Mr. Reisman,
6 as far as you recall, are these the complaints brought to
7 your attention in connection with this matter, from, let
8 us say, the start of the sale in 1960 of this land and
9 through November of 1961, with the exception of one mat-
0 ter here of the Real Estate Department, which I will come
1 to?

2 A Yes, sir, to the best of my recollection
3 these matters right in front of me are the sum total
4 of it.

5 Q Did you some time on or about September 1961

1 make any request of Mrs. Manzin to be notified of
2 complaints if any came in?

3 A Yes.

4 Q To be brought to your attention?

5 A Yes, sir.

6 Q These were the ones that were referred to
7 you thereafter, is that correct?

8 A Yes, sir.

9 Q Now, on November 17, 1961, was a letter
0 written to you from Mr. Scholfield from the Real Estate
1 Division, relative to a matter as to whether or not five
2 or more parcels had been sold to one individual?

3 A Yes.

4 Q And is this the letter?

5 A Yes, sir.

6 Q Are these papers all with reference I have
7 here clipped together with a paper clip, are they with
8 reference to that matter from Mr. Scholfield?

9 A Yes, sir, these contain the entire file
0 in that matter.

1 MR. HUNT: For the record, the papers
2 consist of a letter of November 17, 1961, from Scholfield
3 to Reisman relative to:

4 "It has come to our attention that

5 Gamble Ranch may have sold five or more parcels

Those are the complaints I was aware of and of which I have a record in my file.

Q In connection with your treatment of these complaints, Mr. Reisman, did you have some discussion with Mr. Rockel as to what your wishes were with reference to the handling of these matters?

~~A~~ Yes.

Q Tell us briefly what your discussion with Mr. Rockel was?

A I told Mr. Rockel in my opinion the moment a complaint was brought to his attention that he should immediately check with the sales manager and the salesman involved and have the matter handled that day, to get a complete investigation as fast as possible so that he could then get a report immediately, and after he had made his valuation he should then make a determination ~~as to how to handle the matter.~~

Q There has been some testimony, Mr. Reisman, relative to the cash condition of the Company and relative to the matter of development, other matters of that kind, I wish to touch on briefly with you.

In 1961 with reference to this Company did you have some discussions with Mr. Benaron, Mr. Byrnes and others, shareholders of the Company, relative to the matter of finances?

That I wanted this situation to continue, I wanted to be certain that the sales personnel did not make any misrepresentations of any kind and that I wanted them to review all of the Company literature with the sales personnel, each one individually, and if there was any question in their minds about whether or not the salesmen would follow the proper instructions they were to fire them immediately.

I also told him that I wanted them to be certain that with respect to any complaints of any kind, that immediately upon receiving them they were to forward them to Mr. Rockel's office, and I wanted Mr. Rockel, and I instructed him in the presence of these sales managers to be certain that these customer complaints were investigated and checked immediately the same day, that if they found there was anything at all, any substance of any kind to the complaint there was a full refund to be made immediately.

Q Did you state to Mr. Jacobsen, in substance, "I had nothing to do with the Pace Productions film strip and I only heard of it recently"?

A No, sir, I did not make that statement.

Q What statement did you make?

A Mr. Jacobsen asked me what I had to do with the DuKane film strip and I told him at that time

1962, with reference to the matter of complaints or alleged complaints of any purchasers, were you relieved as an attorney of any duty with reference to any investigations or handling of such complaints?

A I was completely relieved.

Q Will you explain the circumstances and when?

A After the situation arose in January of 1962 when this publicity came about, as a result of Mr. McBride's efforts to -- apparently he was in a fight with Mr. McDonald and he issued this publicity release, and the Company received a flood of complaints. It was like a run on the bank.

At that point, as you heard Mr. Byrnes' testimony, Mr. Byrnes consulted the law office of Wyman, Finell & Rothman, and they handled that matter at that time, until at a subsequent date they turned the matter over to Mr. Ross to be handled in his individual capacity.

When Mr. Ross took that assignment over I had absolutely nothing to do with it. Mr. Ross' fees are separately separate from mine. I never discussed the matter with him. I never looked at his files. Whatever he did in that connection he did on his own as a lawyer.

Q And he did it as a lawyer for the Company?

A Yes, sir, and he was paid for it.

at the Gamble Ranch and it was misrepresented."

And then it goes on to say that the land was not surveyed.

MR. HUNT: May I have the name of that file, please?

MR. NISSEN: The name is Dowler.

Q I notice that the cancellation is dated October 19, 1961.

Do you know why Mr. Rockel would refer to you some of the complaints he did and not refer this one?

A I have no idea at all. If --

Q Is it -- excuse me.

A If Mr. Rockel felt it was in his jurisdiction to refer a matter to me, he referred it. If he didn't, he handled it himself.

Q Did I not understand you to say, sir, some time after July 1961, when the Governor complained, that you told Mr. Rockel to refer all the complaints to you?

A No, I didn't tell him that.

Q Oh. I thought you had, sir.

A I told him to immediately handle them and make sure the customers were satisfied. And I also gave him instructions on what to tell the sales people and the sales managers.

THE COURT: Were there any instructions as

to what Mr. Rockel was to handle, Mr. Reisman?

Were there any instructions Mr. Rockel was to handle this particular type of a complaint and this particular type was to go to you?

THE WITNESS: No, not at all.

THE COURT: Nothing definitive about it?

THE WITNESS: Mr. Rockel was the general manager and vice president in charge of the operations and his instructions were to make certain that he handled all the matters within his best discretion. If he needed any assistance from the legal people of my office, he would call us.

BY MR. NISSEN:

Q Here is the Engle file, 3-887. I notice the purchase date is July 15, 1961, and a letter of complaint to the Company dated August 2, 1961, about a month later.

The letter says in part:

"We have just returned from a visit to Gamble Ranch. We find you have over-sold your land. Improvements that you stated were there, were not! Also the land you sold us was nothing like the pictures you showed us. Therefore we feel this contract is not satisfactory," et cetera.

And then there is a PS:

JOSEPH J. BYRNES

1 of Mr. Rockel, who was the general manager, so that he
2 would request the things at the Ranch, is that correct?

3 A That is correct.

4 Q Were you trying to spin your wheels, Mr.
5 Byrnes?

6 A No, I was very definitely interested in
7 the improvements going into the Ranch.

8 Q What was the refund policy of the Gamble
9 Ranch prior to December 1960 or January -- excuse me --
10 January 1962?

11 A The refund policy was to return the money
12 of any complainant who had purchased land prior -- 30 days
13 prior to the purchase date for any refund whatsoever.

14 If there was a complaint that was over 30
15 days old it was the immediate policy to send the sales
16 manager out to see the purchaser. If they couldn't
17 satisfy him, to refund his money.

18 Q Did you ever have any complaints with
19 reference to alleged misrepresentations, that you know of?

20 A Yes, I know of one complaint that came
21 in and -- well, they went out to see him. It was an
22 Asin and Jarrett sale.

23 They went out to see this gentleman. His
24 name was McCann, and Asin and Jarrett personally talked
25 to me at this time.

1 They said they definitely did not mis-
2 represent. They would go down to the Real Estate Commis-
3 sion.

4 I told Mr. Rockel if this gentleman said
5 there was anything wrong, to find out what. And I think
6 that Mr. Escarzaga or Mr. Rockel went out to see him and
7 talked to him and came back convinced there had been no
8 misrepresentation, but returned his check to him.

Q Gave him his money back?

A Yes.

Q Do you know if anybody was dismissed or
fired from the organization for allegedly misrepresenting
the property?

A Yes, I believe there were two salesmen
discharged.

Q Who were they?

A A Mr. Budd and a Mr. Rae.

Q Do you know where they sold from, what
office?

A Out at the Wilshire office.

Q Here in Los Angeles?

A That is right.

Q Now, some time in 1962 did you have a
discussion with Mr. Finell concerning the policy of the
Gamble Ranch in refunds?

1 A Yes, after the adverse publicity and we
2 started getting quite a few telephone calls and letters
3 started to pour in.

4 Q Do you recall when this was?

5 A January 10th, 11th or 12, somewhere around
6 there right after the publicity, a matter of a few days.
7 It might have been a day or two or three or four.

8 I went up to see Mr. Finell and I told him
9 about the problems, showed him the publicity, had a copy
0 of the publicity with me if he had not seen it. I think
1 I had a copy with me.

2 I asked him what to do. He suggested that
3 he would make up a form and that we send this form out
4 to all complainants, which we followed through on.

5 Q 3-268 already in evidence, a letter of
6 January 22, 1962, to Mr. Finell from yourself, Mr. Byrnes,
7 as president of the Gamble Ranch Investments.

8 It says:

9 "Dear Mr. Finell:

0 "Pursuant to your request, we have
1 herewith compiled all sales cancellations
2 and refunds since the inception of this
3 company up until December 31, 1961. We
4 trust this is the information you desire.

5 "Yours very truly

1 This is a letter you sent to Mr. Finell,
2 pursuant to his request?

3 A Yes, it is.

4 Q There follows 14 pages of "GAMBLE RANCH
5 INVESTMENTS CANCELLED AND REFUNDED CONTRACTS", with a
6 tape total of \$34,955.00. This is 3-268.

7 I show you 3-2029-A, a letter of March 16,
8 1962, to a Mr. Robert McDonald, signed by Maria Manzin,
9 Assistant Secretary.

0 There is attached thereto a letter from
1 Wyman, Finell & Rothman -- it is the original -- dated
2 March 16, 1962, to your attention, Mr. Byrnes, signed
3 Marvin Finell.

4 I will ask you particularly if you are
5 familiar with the second document, which is severally
6 designated 3-2029-A.

7 A Yes, I remember that document.

8 MR. WILLENS: I am not sure, your Honor,
9 whether 3-2029-A came into evidence with the -2029.

0 THE CLERK: It is in evidence.

1 MR. WILLENS: It is in evidence?

2 THE CLERK: Yes.

3 MR. WILLENS: Fine. Thank you.

4 Reading just briefly from that letter of
5 March 16th to Pacific Westates:



1 "Gentlemen:

2 "Pursuant to your request, this letter
3 is written to advise you of our activities
4 regarding the claims for refund which have
5 been filed during the year 1962 by purchasers
6 of land in the Gamble Ranch.

7 "At your request we have reviewed
8 each such request individually including
9 any correspondence and all of your records
10 pertaining thereto, as well as answers to
11 questionnaires prepared by our office for
12 each such claimant to fill out. Upon the
13 basis of our examination of these files,
14 in every instance in which, in our opinion,
15 based upon the documents before us, a valid
16 legal reason for granting such refund has
17 existed, we have advised the company to
18 grant the claimant refund. Consistent with
19 company policy, we have also advised the
20 granting of every refund claim filed with-
21 in one month of the date of purchase of
22 a parcel of land regardless of whether
23 or not legal basis existed for such refund
24 claim. In other instances we have advised
25 the company that in our opinion no legal

1 basis for granting a refund existed
2 and have advised the company to decline
3 such requests."

4 Q Mr. Byrnes, did you at all instruct Mr.
5 Finell how he was to handle these refunds?

6 A No, sir. As a matter of fact, when I
7 first brought the files up to his office, I informed Mr.
8 Finell not to ask my opinion. I wanted him to make an
9 opinion on his own. I didn't want to try to sway him
0 in any way whatsoever.

1 Q I overlooked asking you about this document,
2 1-445, which is entitled "CONFIDENTIAL REPORT TO STOCK-
3 HOLDERS ON GAMBLE RANCH SUBDIVISION & DEVELOPMENT AND
4 GENERAL OPERATIONS".

5 It is dated 30 March 1961. It bears the
6 signature of N. T. Rockel, Vice President and General
7 Manager.

8 Were you familiar with this document,
9 Mr. Byrnes?

0 A Yes, I was.

1 Q To whom was this document distributed,
2 if you know?

3 A To the stockholders of Gamble Ranch.

4 Q Was this a document generally disseminated
5 to the public, as part of any sales program?

MARVIN FINELL

a few months after the firm was retained, were you called upon to take on an additional or secondary role in connection with Gamble Ranch?

A Yes, I was.

Q Can you fix the approximate date of that meeting?

A It would be on the day or the following day there was a newspaper article regarding the willingness of Gamble Ranch to give refunds to any purchaser who was dissatisfied.

Q It might help you -- at least we have all been told now that January 9, 1962 or January 8, 1962, one of those two dates was the date of that publicity.

I take it your visit with the Gamble would be about the next day, the 9th or 10th?

A That is correct.

Q And who counselled with you on that day?

A Joe Byrnes.

Q And where was the meeting?

A In my office.

Q Can you give as best you can recall the substance of that conversation?

A Yes.

Mr. Byrnes came into the office and he showed me an article, which I believe had appeared in the

Los Angeles Times, and the article stated that, as I recall, there had been a representation in connection with a hearing on complaints regarding fraud, or something of that nature, by Gamble Ranch, that anyone who was dissatisfied could receive his money back.

He discussed with me the problem of handling the complaint he felt the Corporation was going necessarily to be flooded with.

On reading it, it was quite clear that everybody who had ever purchased the property, regardless of the reason for his dissatisfaction, was going to now seek a refund if he saw the article in the Times.

He asked me how, in my opinion, the matter should be handled, that is, the matter of the complaints that would come up at that time.

Q Up until that time had the firm had anything whatever to do with the question of customer activities, customer complaints?

A No, nothing.

Q Go ahead.

A And he told me that in the past it had been policy of the Ranch to make refunds whenever anybody complained. And particularly in all instances they had given refunds if the complaint had been within the first month of the purchase.

1 But under the present circumstances, we
2 concurred that it was not going to be feasible to give
3 refunds to everybody who asked for them.

4 I suggested to him, in order to determine
5 what refund complaints or requests were based upon mis-
6 representation and which ones were dissatisfaction with
7 either inability to make payments in the past or from
8 reading the newspaper article which connected the Ranch
9 with claims of fraud, that I prepared a questionnaire
10 to be sent out to everybody who had sent in a subsequent
11 complaint requesting a refund.

12 Q Now, was this your suggestion, that the
13 questionnaire be filed?

14 A It was.

15 Q Go ahead, sir.

16 A I prepared the questionnaire, and I assumed
17 that copies of it were made by the Company.

18 When complaints were received they were --
19 the sender of the complaint was sent a letter which I
20 had drafted, along with the request that he fill in the
21 enclosed questionnaire.

22 When the reply came in, then the entire file
23 was given to me by Mr. Byrnes and someone else who was
24 working out there at the office of Gamble Ranch at that
25 time, with authorization to me to handle it as I thought

proper.

Q Now, that somebody else, I think, if it were to refresh your recollection, was probably Mr. Rockel.

A Mr. Rockel, yes.

Q Did you pass upon these refund claims thereafter, independent of any of the defendants in this case?

A My instructions from Mr. Byrnes were to handle them the way I thought was proper to handle them, and I would not have handled them in any other way, in any event.

Q For how long a period of time did you maintain the role of handling these complaints?

A Two, three or four weeks, until the pattern of the responses came clear, and I had handled quite a few of them, and thereafter it was merely a matter of handling them in accordance with a pattern.

Q Ultimately I think they were turned over to another firm, back to Mr. Ross, is that correct?

A I don't know. I told Mr. Byrnes that somebody in the Gamble office themselves could handle them, so far as I was concerned.

Q Who was it that suggested in that meeting, you or Mr. Byrnes, that the tests for the refunds should be based on the question of misrepresentation?

A Me.

Q Was that your independent judgment?

A Yes, sir.

Q Did you tell Mr. Byrnes why they should do it that way?

A Yes.

Q What was your explanation to him?

A It was my opinion that if any other method of handling it were used the entire operation was going to collapse.

Q Is that because of the publicity that you had -- which had been brought to your attention?

A Yes, sir.

MR. NISSEN: To which we will object, your Honor. I think counsel's partner could probably answer without a leading question.

MR. ROTHMAN: I am sure he could. I will try to avoid it.

THE COURT: Yes, avoid leading questions.
BY MR. ROTHMAN:

Q If I may go back now to your Corporation Commission activities.

I want you to examine, Mr. Finell, Exhibit ED in evidence, which is correspondence between you and the California Division of Corporations, and then the

BERTRAM H. ROSS

1 Q Some time in that interval?

2 A Some time in that interval. The employment
3 was arranged basically at the request of Wyman, Finell &
4 Rothman office, and Mr. Byrnes and Mr. Benaron.

5 Q Your employment at that time was with
6 reference to matters with the Real Estate Commissioner,
7 for one thing, is that correct?

8 A That is correct.

9 Q And at that first employment or at the time
0 you commenced to assume such duties as independent counsel,
1 do you recall, sir, whether or not your duties encompassed
2 other matters at the particular moment or was that the
3 particular specific matter at the time?

4 A I can't say.

5 I think basically there were two areas I
6 was representing the Company in connection with, and
7 that was with the Real Estate Division and with the handling
8 of complaints, because prior to my handling the complaints
9 there was a circular letter sent out to those complaining
0 by the Wyman office, and I took over whatever files they
1 had or lawsuits, so I would say those were the two areas
2 at that time.

2 Q All right, sir.

2 MR. HUNT: Now, with reference to the letter
2 of June 1, 1962, I would like to offer the letter which

1 and dated April 27, 1962, by John W. Carey, vice president
2 of Pacific Weststates and by Pete Ludwig and Kay Kimber.

3 You were familiar with that, were you
4 not?

5 A Yes, sir.

6 Q Now, I think I called your attention yester-
7 day -- I am not quite sure -- to Exhibit 3-2109 relative
8 to your being forwarded a certain letter pertaining to
9 refunds and listing them. I am sure I did.

10 Did you from time to time during the period
11 you were handling these matters have complaints receive
12 some communications from the Company forwarding to you
13 letters from purchasers and requesting you proceed to
14 communicate with the purchasers as the lawyer and in
15 your judgment attempt to settle, deny the request or
16 dispose of it that you as a lawyer believed to be the
17 proper way to do it?

18 A That is correct.

19 In addition to receiving letters I insisted
20 that the Company supply me with a sheet indicating the
21 complete history of the particular contract.

22 I also wanted a copy of the Public Report
23 signed by the customer and any other information in the
24 file that would be helpful in ascertaining the status
25 of that particular contract.

1 And the document now being examined by Mr.

2 Nissen is a carbon copy of that summary, and the letter
3 dated March 1, 1963, is signed by me. It was dictated
4 by me and was by my office forwarded through the mails
5 to Mr. Rothman.

6 MR. HUNT: At this time, your Honor, I
7 would offer the letter of March 1, 1963 and the list of
8 defendants' next in order.

9 THE CLERK: Defendants' ER for identification.

10 (Documents were marked
11 Defendants' Exhibit ER
for identification.)

12 MR. HUNT: I offer them into evidence.

13 THE COURT: All right. ER is ordered in
14 evidence.

15 (Documents marked Defendants'
16 Exhibit ER were received
in evidence.)

17 MR. HUNT: I think they should be combined.

18 MR. NISSEN: Yes. That is fine.

19 BY MR. HUNT:

20 Q In this letter, Mr. Ross, you state:

21 "Dear Frank:

22 "At long last I have been able to
23 prepare a summary of all complaints serviced
24 by this office since last July, which should
25 be helpful to all of us in any discussions

1 that we have in the future either with
2 Holly Corporation or with Mr. Whelan's
3 office.

4 "The enclosed list covers all com-
5 plaints that have crossed my desk up to
6 March 1, 1963."

7 I take it from this letter, Mr. Ross, it
8 refreshes your recollection that complaints you handled
9 were for a period of about July 1962 to the first of
10 March 1963.

11 A Yes.

12 I was in error. I must have been in error
13 when I thought it was to the end of '62 yesterday, but
14 apparently it lapped over into the early part of 1963.

15 Q (Continuing reading)

16 "I wrote you a letter separately out-
17 lining any lawsuits that are pending
18 and according to my best recollection
19 there are only nine lawsuits involving
20 land contract purchasers.

21 "As I glance over the list I am
22 pleased to note that only half the
23 complaints have been settled and that
24 settlements are pending on about 25%
25 more, leaving a very small number that

1 have not been resolved.

2 " I am sending a copy of this letter
3 and a copy of the within list to Stan Weiss..
4 I don't have enough copies to send one on
5 to Joe Benaron, but suggest that you dupli-
6 cate the within list so that he may also
7 have a copy of the same.

8 "Sincerely yours,

9 "BERTRAM H. ROSS"

10 Q Then as to the attached list, it appears
11 to be in alphabetical order, the name and address of the
12 purchaser, the dollar amount of the contract, the amount
13 paid on the contract and the disposition of the complaint
14 of the purchaser, that is to say, whether it has not been
15 resolved, whether it is still pending or how it was
16 settled, if it was settled, or if it was rejected, is
17 that correct, sir?

18 A That is correct.

19 Q Without going through this list, approxi-
20 mately, Mr. Ross, during the period of time that you
21 were acting as counsel for the Company, in connection
22 with the complaints that purchasers sent in, from the
23 period you have outlined, from about July to the first
24 of March, July '62 to the first of March 1963, how
25 many such complaints, if you recall, or from your

1 records you can state that you handled?

2 A Looking at the list I see there were
3 269 summarized, so I would say that there were that
4 number, and there were some lawsuits. I don't think
5 there were over ten or twelve lawsuits, but without see-
6 ing the letter I referred to, which outlined the specific
7 suits and the status of them, I don't want to be more
8 specific than that.

9 Q You wrote another letter outlining these
10 suits, the specific suits, and you indicated in this
11 letter that there are pending nine lawsuits, to the
12 best of your recollection.

13 A And that was correct as of that date.

14 Q In reference to your statement as to the
15 disposition of the complaints, as you outlined, I take
16 it this was - -

17 / This percentage that you computed, it is
18 estimated from the files that you were referring to?

19 A Yes.

20 I will rely on my letter. I couldn't tell
1 you now.

2 Q Now I wish to take you back again, Mr.
3 Ross, to the month of July 1961.

4 Do you recall an occasion where there came
5 to your attention a letter from the Governor of

1 the Commission.

2 THE COURT: A letter to whom?

3 MR. NISSEN: A letter from Mr. McDonald to
4 Mr. McBride, sir.

5 Q Did he ever tell you that, sir?

6 A If he did, I don't remember at this point.

7 Q And he never told you then, sir, his letter
8 or his reading of it ever mentioned a requirement of mis-
9 representation as the basis for a refund?

10 A I have no --

11 If you will show me that letter, it will
12 refresh my recollection.

13 Q I don't have the letter he sent to you,
14 if in fact he sent one. I only have his letter to the
15 Commission is all.

16 I notice also a letter - it is not a letter,
17 but a memo. Excuse me. It is Defendants' EO, your memo
18 to Mr. Reisman on March 29, 1962. That is about the time
19 -- in fact, it is the same date as your letter to Mr.
20 McDonald asking him to write that statement consistent
21 with the truth and consistent with your views.

22 And you say in the third paragraph of
23 your memo to Mr. Reisman:

24 "On the advice of Benaron and Byrnes

25 I have sent Block a copy of the refunds given

1 and in process and I have likewise written
2 about McDonald to get a letter out setting
3 forth the representations he made to the
4 Nevada Real Estate Commission. I re-
5 viewed with Bob our understanding of what
6 he said and I am sure his letter will be
7 consistent therewith."

8 At this time you still didn't know what
9 Mr. McDonald had told the Commission, did you?

10 A This is dated the same date of my letter to
11 Mr. McDonald.

12 I don't have a recollection of it, what Bob
13 had told me.

14 Q You still were sure it would be consistent
15 with what you told him you had told --

16 A No, I was hopeful it would be, but I was not
17 asking him to distort the truth, Mr. Nissen.

18 Q I show you a letter in the same file,
19 2-1266, Mr. Ross, marked C, to Mr. McDonald again from
20 you, dated March 26, 1962.

1 Now, that refers to a list of refunds which
2 you are enclosing and you tell him what the list includes
3 and you state:

4 "I think the Nevada Real Estate
5 Commission will realize that we have done

a substantial job and that any statements to the contrary are negatived by the enclosed documents."

Meaning the list of refunds made.

A That is right.

Q I think you say there the actual cash refunds exceed \$33,000.00?

A That is right.

Q You go on to state on the second page of that letter:

"Joe Byrnes advises me that you have a list of names of customers to whom refunds were denied. Please do not file this list under any circumstances, as it will give Mr. McBride all too much ammunition. I think the enclosed lists will be helpful to you in order to obtain the desired result.

"This is extremely important to us and we cannot impress too strongly on you the necessity of expedition in this matter."

Were you aware, sir, when you sent that list of refunds to Mr. McDonald, sir, to use with the Real Estate Commission that out of the \$33,000.00 on the list of refunds made only about \$2,000.00 was

1 made after the publicity in '62 and the other \$31,000.00
2 was made before the publicity?

3 A No, I wasn't aware of that.

4 Q Who compiled that list for you?

5 A It came to me through the office. I don't
6 know who prepared it in the office.

7 Q Why was it you didn't want the Real Estate
8 Commission to get hold of a list of people that were
9 denied the refunds?

10 A I didn't want to have to defend too many more
11 lawsuits; the habit of stirring things up, you know.

12 Q By the way, Mr. Ross, when you were handling
13 these refunds matters, as distinct from whatever else
14 you have done for the Company, sir, who was the man at
15 the Company who set the policy, so far as you observed,
16 on refunds?

17 A John Carey was in charge of the office,
18 followed by Stan Weiss.

19 I don't think they really set the policy.
20 I think I was permitted a pretty independent hand in
21 working these things out.

22 MR. NISSEN: Your Honor, I have a Grand
23 Jury transcript and I ask that page 14 be released for
24 the purposes of asking the witness if he made a state-
25 ment contained thereon.

1 THE COURT: Yes, it may be released.

2 BY MR. NISSEN:

3 Q Mr. Ross, I call your attention to page
4 14. You read any of it you want. If you think the
5 context isn't there and you want to go back and read, I
6 am sure the Court will release it.

7 It is starting with line 4. Would you read
8 the question and answer and tell me if you made that answer
9 with respect to that question.

0 A (Witness complies.)

1 Yes, I made that answer.

2 Q The question is:

3 "When you say the Company you are re-
4 ferring to what persons in the Company as
5 having charge of the-refund policies at that
6 time, Mr. Byrnes?

7 "A Mr. Byrnes was the man who was
8 on that."

9 Is that true, sir, Mr. Byrnes set the refund
0 policies?

1 A Well, let's see what the time was.

2 Mr. Byrnes was in the office after Rockel
3 left. My correspondence basically was with Messrs.
4 Carey and Weiss.

5 Q Your testimony here doesn't indicate a date.

1 Now, what he did with them and so forth
2 and how he used them, why, you can go into that if you
3 want.

4 BY MR. HUNT:

5 Q Were copies of these questionnaires submitted
6 to the defendants for their inspection and their informa-
7 tion?

8 A I would say to one of the defendants, at any
9 rate. I think Mr. Reisman saw these. I think Mr. Benaron
10 was advised of the --

11 MR. NISSEN: That is completely hearsay,
12 then. He thinks he was advised.

13 THE COURT: It isn't if he knows.

14 MR. NISSEN: If Mr. Benaron says he saw them,
15 that would be something else.

16 THE COURT: When you say you think he was
17 advised, Mr. Ross, on what do you base that?

18 Do you know Mr. Benaron was advised?

19 THE WITNESS: Yes, I think I had a conversation
20 with Mr. Benaron in which I told him that these question-
21 naires came in.

22 As a matter of fact, I think that he physically
23 saw these because he was present in the office of the Real
24 Estate Division the day these were handed to Mr. Poppe;
25 either these or copies of them.

1 to the individual persons requesting same, is that correct?

2 A I don't think so. I am not going to be too
3 definite on that.

4 Basically, I set the policy that I was going
5 to get the best settlement I could make and if I would
6 pick up the telephone to talk to someone at Gamble Ranch
7 offices I didn't particularly decide whether it was Carey
8 or Stan Weiss or Joe Byrnes were there, that I would talk
9 to them.

10 I don't want to go beyond my memory. But
11 so far as Mr. Byrnes having anything to do with these
12 refund letters, he didn't have anything to do with them.
13 He may have been the source of some specific information
14 in the office I wanted.

15 Q In other words, if you are to get a contract
16 and you called and no one else was around and Mr. Byrnes
17 was there, you talked to Mr. Byrnes, and he would accom-
18 modate you and send you the file or whatever it was?

19 A There might have been files other than the
20 files of these matters I would ask him to send me.

21 Q With regard to the specific refunds, and
22 the way you wrote letters and the way you dealt with
23 it and what you said, that was your independent decision?

24 A That is right, I handled those.

25 Q When Mr. Nissen asked whether Mr. Byrnes

1 to the individual persons requesting same, is that correct?

2 A I don't think so. I am not going to be too
3 definite on that.

4 Basically, I set the policy that I was going
5 to get the best settlement I could make and if I would
6 pick up the telephone to talk to someone at Gamble Ranch
7 offices I didn't particularly decide whether it was Carey
8 or Stan Weiss or Joe Byrnes were there, that I would talk
9 to them.

10 I don't want to go beyond my memory. But
11 so far as Mr. Byrnes having anything to do with these
12 refund letters, he didn't have anything to do with them.
13 He may have been the source of some specific information
14 in the office I wanted.

15 Q In other words, if you are to get a contract
16 and you called and no one else was around and Mr. Byrnes
17 was there, you talked to Mr. Byrnes, and he would accom-
18 modate you and send you the file or whatever it was?

19 A There might have been files other than the
20 files of these matters I would ask him to send me.

21 Q With regard to the specific refunds, and
22 the way you wrote letters and the way you dealt with
23 it and what you said, that was your independent decision?

24 A That is right, I handled those.

25 Q When Mr. Nissen asked whether Mr. Byrnes

objected to any of these letters, he would have had no

knowledge of the letters prior to the time that they went out?

A That is true. Whether he looked at the copies that were sent, as a matter of routine at the Gamble office, I don't know.

Q But they were not sent specifically to him?

A No.

Q They were just sent to Gamble Ranch?

A Yes.

Q I assume the same would be true with respect to Mr. Reisman.

Would that be a fair statement, that Mr. Reisman did not interfere with or have anything to do with your handling of the refund letters, and that was you independent --

A That is correct.

MR. WILLENS: Nothing further.

THE COURT: Is that all?

MR. NISSEN: No.

RECROSS EXAMINATION

BY MR. NISSEN:

Q With respect to those refund letters that you didn't send carbon copies to Mr. Benaron, Byrnes or

1 Reisman, sir, you did know Mr. Benaron, whatever his
2 title, that he was boss at Gamble Ranch?

3 A I would say he was the big money man out
4 there.

5 Q And you knew he could look at the files over
6 there and find your letters any time he wanted to, don't
7 you?

8 A Of course, he could.

9 Q And so could the others?

0 A That is right.

1 Q And you --

2 A Mr. Reisman didn't have to go that far.

3 Q He is right next door to you?

4 A That is right.

5 Q And he could come to your door into your
6 office and find the letters?

7 A That is right.

8 Q You say you got information from Mr. Byrnes
9 from time to time on specifics that went into those letters,
0 and you have already mentioned some things about the wells
1 and other things, agriculture, and that type of thing that
2 he told you, right?

3 A Yes, -- well, I got that information for
4 other reasons than these letters. I actually called for
5 and got the files of the Gamble Company in connection with

ROBERT L. McDONALD

right.

-2059-A is objected to.

THE COURT: -2059-A is an attachment to --

MR. ROTHMAN: -2059.

THE COURT: You are now objecting to -2059?

MR. ROTHMAN: Yes. I saw the name Wyman up there. I thought that was a different Wyman.

I am objecting to -2059 and -2059-A.

-2060 is objected to. -2061 is not. -2062 is objected to, -2063 is objected to, -2064 is objected to, -2065 is not, -2066 is not, -2067 is not. -2068 is not and -2069 is not.

THE COURT: All right.

Can you go ahead now, Mr. Nissen?

MR. NISSEN: I think we can.

Q But for the purpose of the Court's ruling on those objections, I ask you, Mr. McDonald, what was your practice when you would receive a request for a refund or a complaint from a purchaser or purchaser's attorney?

A I would forward the letter to the office of Pacific Land -- Gamble Ranch office in Los Angeles.

MR. NISSEN: I don't want to go through the ones that aren't objected to, your Honor.

Can I just offer those?

THE COURT: Yes, but I want to find out a little

more about these.

You forwarded it to Gamble Ranch in Los Angeles, but then did you get information upon which you based the reply?

I notice some copies of replies.

THE WITNESS: There is only one, your Honor.

Do you want me to explain this?

THE COURT: You say there is only one, you mean there is only one letter you wrote?

THE WITNESS: I dealt with one refund in connection with a Nevada attorney. The rest of them I forwarded merely the letter to the Los Angeles office.

THE COURT: You didn't make any reply?

THE WITNESS: That is correct.

THE COURT: You would reply to the extent that you did say you had forwarded the letter to the Los Angeles office?

THE WITNESS: That is correct.

THE COURT: All right.

Now go ahead, Mr. Nissen.

BY MR. NISSEN:

Q One transaction you refer to, sir, as having handled with the Nevada attorney is the Puckett transaction?

A That is correct.

THE COURT: Did you handle that at the request

1 by the address?

2 A Yes.

3 MR. NISSEN: We offer that as Government's --

4 THE COURT: This is what letter, now?

5 MR. NISSEN: -B.

6 THE COURT: Ordered in evidence.

7 (Letter marked Plaintiff's
8 Exhibit 2-1266-B was re-
9 ceived in evidence.)

10 BY MR. NISSEN:

11 Q I note Mr. Ross commences:

12 "Dear Bob:

13 "I had a go-around with our Real Estate
14 Commissioner today and he wants a definite
15 statement from you as to what you told the
16 Nevada Real Estate Commission in connection
17 with refunds. All that he knows is what he
18 read in the newspapers and trouble multiplies.

19 "Will you please write a letter to W. A.
20 Savage, Real Estate Commissioner" et cetera.

21 "Please send the letter to this office for
22 transmittal to the Commissioner. In the
23 letter please state what you told the Nevada
24 Real Estate Commission when you addressed them
25 on behalf of our client. I told the Commissioner
that you stated that the Company was ready, willing

and able to make a refund to any purchaser who had purchased any land from our Company based upon false or fraudulent misrepresentations. I think this is what you told the Commissioner, but the newspapers indicated that we were willing to make refunds to anybody who wanted a refund.

"If you will send me a letter consistent with the truth and consistent with the views that I have expressed herein, it will be very helpful to the solution of some of our new problems.

"Sincerely yours,"

and then the signature.

I have, Mr. McDonald, Government's 3-2032, a letter of September 26, 1961, and I ask you, sir, is that the letter that you read into the Minutes of the Nevada Real Estate Commission on January 8, 1962?

A Yes.

THE COURT: What was the exhibit number again?

MR. NISSEN: 3-2032. It is one that we have previously offered.

THE COURT: Yes, I know.

BY MR. NISSEN:

Q Mr. McDonald, I want you, please, to look at

who feel they have been treated unfairly"?

A That is correct.

MR. NISSEN: The next letter I have, your Honor, that we would mark -C, a two-page letter of March 26, 1962, to Mr. McDonald from Mr. Bertram H. Ross for Samuel Reisman.

THE COURT: All right. -C is ordered in evidence.

(Letter marked Plaintiff's
Exhibit 2-1266-C was re-
ceived in evidence.)

BY MR. NISSEN:

Q I notice it is dated March 26, 1962 and it starts out:

"I am enclosing herewith a list of refunds made by Pacific Westates up^{to} and including March 21, 1962.

"This list is sent to you in duplicate and you will note that the total contract prices on the refund items exceed \$545,000 and the actual cash refunds exceed \$33,000.

"I am likewise enclosing herewith in duplicate a list of applications for refund which are in process at the present time.

"I think the Nevada Real Estate Commission will realize we have done a substantial job and that any statements to the contrary are negatived by the enclosed documents.

"I am enclosing in duplicate some material concerning the clothing factory that is being installed at Montello, Nevada. It appears that this factory is now a reality and the Commission will undoubtedly be interested in the enclosed material."

Then there is the request for you to take the matter up with the Commission as soon as possible.

On the next page in the first paragraph it says:

"Joe Byrnes advises me that you have a list of names of customers to whom refunds were denied. Please do not file this list under ^{any} circumstances, as it will give Mr. McBride all too much ammunition. I think the enclosed list will be helpful to you in order to obtain the desired results.

"This is extremely important to us and we cannot impress too strongly on you the necessity of expedition in this matter.

"Sincerely yours,

"Bertram H. Ross."

MR. NISSEN: And we have, your Honor, a letter of February 14, 1962, from Mr. McDonald to Mr. Byrnes and I would mark that -D, I believe.

THE COURT: -D is ordered in evidence.

JOHN W. CAREY

0257
1 were your duties at that time, sir?

2 A Well, it was primarily administrative.

3 At that time -- at the time I was brought over
4 it was somewhat as a replacement for Mr. Rockel, except
5 that when I was brought over Stanley Weiss was placed
6 in charge of the physical operation of the Ranch and the
7 visitations of the customers to the Ranch, and so on.

8 Then I was to handle the administrative and
9 of the Company.

0 Q All right.

1 In the course of that did you have occasion
2 to handle or process refund claims?

3 A Yes, I did.

4 Q Would you tell us to what extent you handled
5 that and what steps were followed in the processing of those
6 claims?

7 A Well, originally, when I first came there,
8 there were a number of refund claims that had been already
9 filed with the Company and there was a file of those re-
10 fund claims.

11 Then some of them were not -- the processing
12 was not completed on some of them, so that if a settlement
13 couldn't be made with the customer and they simply insisted
14 on a refund, then I turned over the file to Mr. Finell,
15 an attorney, for his advice as to what to do.

1 Q On whose instructions did you turn those over
2 to Mr. Finell?

3 A Mr. Byrnes.

4 Q At this time was Mr. Byrnes still officed at
5 the Company?

6 A Yes.

7 Q Was he there throughout the time you were
8 there, sir?

9 A Yes.

0 Q All right.

1 You mentioned turning these requests over to
2 Mr. Finell.

3 Sir, at the time you were doing this were
4 you familiar with the financial condition of the Company?

5 A Yes.

6 Q And did the Company have the money to refund
7 to the purchasers who were demanding refunds?

8 A Some refunds could have been made up until the
9 cease and desist order was signed. But after that the
0 Company's financial situation wasn't good enough to allow
1 cash refunds.

2 Q And before that was the situation good enough
3 to permit all the refunds to be made?

4 A No.

5 Q Now, procedurally, sir, did you have anything

1 to do with the questionnaire that was submitted to
2 customers who were claiming refunds?

3 A No, that had been designed and mimeographed
4 before I came with the Company.

5 Q Now, did there come a time, sir, when Mr.
6 Finell no longer passed on the refunds while you were
7 there?

8 A Yes. Mr. Bert Ross was substituted for Mr.
9 Finell.

10 Q And on whose instructions?

11 A I am not sure who told me, but he might have
12 told me himself.

13 Q Did you make the decision or did somebody above
14 you?

15 A Someone above me made it.

16 Q Who were your superiors at that time?

17 A Mr. Byrnes and Mr. Benaron.

18 Q Now, when Mr. Ross took over the handling of the
19 refund claims, was there any discussion, sir, about an
20 approach that could be used to possibly reach a settlement
21 with some of these complaining people?

22 A At one point -- and I can't remember exactly
23 what date -- Mr. Benaron suggested that since the Company
24 didn't have enough cash to make these refunds that we
25 should settle the claims by giving the customers paid up

1 land for the amount of cash that they had paid into their
2 contract.

3 For example, if they had paid 25 per cent of
4 the purchase price of a 40-acre parcel, we would give
5 them a 10-acre parcel free and clear and cancel the con-
6 tract.

7 Q When these matters were referred to Mr. Ross,
8 can you tell us just as a matter of office routine how
9 that was done?

10 Did you physically send the complaint letter?

11 How did you go about referring it to Mr. Ross?

12 Q If it came in by letter, the letter was sent
13 down to Mr. Ross the same day.

14 We prepared a refund control sheet to keep in
15 our own office and started a refund file in our own office.

16 Q And when Mr. Ross, if he did, sent out a reply,
17 did the Company receive a copy for its file?

18 A Yes.

19 Q On that customer?

20 A Yes.

21 Q And were these files, sir, available in the
22 office for Mr. Byrnes or whoever else was there?

23 A Yes.

24 Q Now, sir, did you ever deny any refund claims
25 on your own? Finally denied them without anybody

1 else's say so?

2 A No.

3 Q Do you recall if you ever had a conversation
4 with Mr. Byrnes regarding a newspaper clipping about the
5 Nevada Real Estate Commission?

6 A Yes, I do. I believe it was in January of
7 1962 when I was still in Pasadena at Grace and McCann.

8 I happened to go over to Gamble Ranch from
9 Wilshire Boulevard for some reason and Mr. Byrnes had
0 shown me the article that was in the paper, I believe,
1 the day before or the week before and asked for my opinion
2 about it.

3 Q What conversation occurred then?

4 A Well, after I read it I -- the article basically
5 said that anybody that wanted a refund could have a refund.

6 So I said, "That is great. This shows this
7 ^{the} kind of company the public would like to do business
8 with."

9 Q Did Mr. Byrnes say anything about the article?

0 A He said that wasn't the answer he wanted.

1 Q In addition to handling the refund claims,
2 sir, did you have any responsibilities with respect to
3 budgeting the Company's money during the time you were
4 there?

5 A Yes, I did.

1 and good.

2 MR. ROTHMAN: The Government introduced 2-186
3 into evidence.

4 Since it was written by firm I decided not to
5 ask for the original.

6 Q At any rate, in it you said under Sub-paragraph
7 (d):

8 "Under the direction of independent
9 counsel has required that the advertising
0 agency for the Company to submit all bro-
1 chures to a Deputy in the Office of the
2 Real Estate Commission."

3 A I would have been told that had been done.

4 Q Now, these varying complaints which have been
5 read into the record by Mr. Nissen, and in part by some
6 of the attorneys for the defense here, as it relates to
7 your activity, of course, with all complaints that came
8 to you after this January 1962 incident, is that correct?

9 A Yes.

0 Q So far as you were aware, when this January
1 '62 article came into existence, and you thereafter came
2 to the Company, the Company policy, so far as you were
3 concerned, was to turn the complaints over to legal counsel,
4 isn't that correct?

5 A I wasn't listening closely enough.

Could you say that again?

Q Yes.

As I understood your testimony -- you correct me if I am wrong -- when this flood on the bank came, that is, the complaints following the January '62 article, the program, insofar as the handling of these complaints was concerned, was to refer them to legal counsel, isn't that correct?

A Yes, that is correct.

Q And these were the instructions that were given to you by whom?

A By Mr. Byrnes.

Q So what you did at the Gamble was that you processed the claim into these folders that you talked about and then off they went for review by the attorney, is that correct?

A Yes.

Q And early in the situation the attorney who did it was Mr. Finell and later it became Mr. Ross, is that correct?

A Yes.

Q I take it that you were aware of the fact that these gentlemen were charged with the responsibility by management of sifting through these complaints and making the disposition on them that in their legal judgment they

GERALD L. WELLER

Mr. Byrnes.

Q All right, sir.

In your work of taking care of collections, -- delinquent accounts, did you say, sir?

A Yes.

Q In that work, sir, from time to time did you send out letters to the various customers that were delinquent?

A Yes, I would.

Q Were the letters that you sent out, sir, ones that you authored without consulting anyone, or were they ones that had been discussed with someone?

A The concept or the stock was given to me and then I would broaden that point.

That is, I never came up with a policy of my own accord or did I ever come up with the procedure to be followed, but this would be given to me and then I would broaden it in my own way.

Q Who would give you the policy to be followed?

A It usually would be -- in all cases it would be cleared usually with Mr. Benaron, Mr. Byrnes, and usually Mr. Reisman.

Q Did you ever have occasion to send them copies, the carbon copies of your material?

A Always of the -- at least not of the first

1 one, at least the first few of any final draft or
2 any final thought that I had of the pattern that I followed.

3 Q Did you ever send out anything that had not
4 been checked and cleared by them in that fashion?

5 A Never.

6 MR. NISSEN: Your Honor, we have a group of
7 Gamble Ranch Company files -- papers, rather, and they
8 are not in a file.

9 They are marked 3-1 to 3-100.

0 These we offer, dealing with collections of
1 accounts.

2 MR. HUNT: 3-1 to 3-100?

3 MR. NISSEN: Yes.

4 THE COURT: 3-1 to 3-100 are ordered in
5 evidence.

(Documents marked Plaintiff's
Exhibits 3-1 to 3-100, both
inclusive, were received
in evidence.)

6 BY MR. NISSEN:

7 Q We won't take the time, Mr. Weller, to go
8 through all of them at this time, but we may pick some
9 examples.

I notice here in 3-1, a green memo from you
to Mr. Byrnes, and attached to it apparently is a mimeo-
graphed type of letter.

MR. NISSEN: Yes, sir.

THE COURT: All right. Ordered in evidence.

(File marked Plaintiff's
Exhibit 3-1608 was re-
ceived in evidence.)

BY MR. NISSEN:

Q I notice a letter of April 2, 1962, Mr.

Weller, over your name as the Manager of Special Collec-
tions, to a customer named Shultz.

Now, we are interested hereonly in the second
paragraph and that says:

"With regard your request for cancella-
tion and refund of moneys paid in, this is to
advise that this is not possible. The recent
news item pertaining to refund due to customer
dissatisfaction requires an explanation that
this is the case, and has always been, in the
event of a customer factually proving that
our project was not what they were led to
believe. You state, this is not the case as
far as you are concerned."

Now, Mr. Weller, would you tell us, please,
if this is merely your statement of the Company's policy
on refunds or if you checked with anybody before you stated
that, sir?

A I checked.

Q Would you tell us with whom you checked?

A I can't remember with whom I checked on this specific instance.

But this thought was as a result of a meeting after the adverse publicity first broke and how we would -- those of us who were on the staff would carry requests or demands, or whatever the case might be, from disgruntled buyers.

THE COURT: Who was at that meeting that decided that?

THE WITNESS: I can't remember exactly who it was, over and above --

I remember the meeting taking place and the office in which it took place, and Mr. Byrnes, Benaron and Reisman.

I think Mr. Rockel was the office manager at the time, and whoever the sales manager was at the time.

THE COURT: All right.

MR. NISSEN: We offer these further documents, your Honor: 3-275.

THE COURT: 3-275?

MR. NISSEN: Yes, sir.

THE COURT: Gamble Ranch file?

MR. NISSEN: A form letter from the Gamble file.

THE COURT: Ordered in evidence.

MARIA M. MANZIN

THE COURT: Yes.

(The record was read.)

MR. HUNT: Thank you.

I will clear it up on cross examination.

THE COURT: All right.

MR. NISSEN: The document Mr. Hunt looked at, of course, has Mr. Bert Ross' name on it.

This was before this witness was doing the Gazette, as I understand it.

Q Mrs. Manzin, from time to time at Gamble were you ever called upon to send out letters to customers who had requested refunds?

A Yes, toward the end.

Q Would you tell us, please who would come to you with that particular task, in the ordinary course of your work?

A Well, the letter would -- sometimes the letter would come into the office, requesting a refund and then I would either go to Mr. Rockel or Mr. Byrnes, to see if refunds could be made on this particular one.

They would tell me yes or no, whatever it was to be.

Q They would tell you what to do with the request?

A Yes.

Q I see.

THE COURT: What is this last one, 3- --

MR. NISSEN: 3-862.

THE COURT: This is a Gamble Ranch file and you will use it with this witness?

MR. NISSEN: Yes, sir.

THE COURT: 3-862 is ordered in evidence.

(File marked Plaintiff's Exhibit 3-862 was received in evidence.)

BY MR. NISSEN:

Q I notice in the file, Mrs. Manzin, a letter date stamped September 8, 1961, which happens to be addressed or headed, "Mr. Arnold Clejan" and it says:

"I inspected the property you sold me at the Gamble Ranch and it was misrepresented. There is no water."

Now, some of the words are underlined in red, apparently, by Gamble Ranch rather than by the writer, would that be so?

A Yes.

Q "The land is not surveyed as you stated. There is no access road to said property and many other facts that make this property useless. Therefore we would like our deposit returned immediately."

Now, thereafter, I notice in the file a letter

of September 29, 1961, over your name, to the Dowlers.

Did you consult with anyone before you wrote that letter, about whether a refund would be made?

A Yes, I would have consulted with Mr. Rockel or Mr. Byrnes, to see what to reply to the customer's complaint.

Q I see.

Did you reply as you were instructed, substantially?

A Yes.

Q I notice your letter says:

"We are also deeply hurt that you feel Gamble Ranch was misrepresented to you, for we have never, at any time, to our knowledge, made misrepresentations regarding our property.

"However, the policy of our organization is satisfied customers and we are therefore, terminating your agreement."

My question to you is, on this statement of the "policy of our organization", at this time, to your knowledge, was it the policy of Gamble Ranch to refund money to customers who were not satisfied?

A As far as I knew, yes.

Q And who told you that that was the policy?

A Mr. Byrnes.

Q In fact, in this situation, your letter of October 19, 1951, --

A It should be 1961.

Q Yes, '61. It does, in fact, send a refund check.

A In the amount shown.

Q In the amount of \$90.00, which was for a full refund of all money paid?

A Yes.

MR. NISSEN: We offer, your Honor, 3-2101, a letter of February 26, 1962 from Mrs. Manzin to Miss Jane Cody.

THE COURT: 3-2101 is ordered in evidence.

(Document marked Plaintiff's Exhibit 3-2101 was received in evidence.)

BY MR. NISSEN:

Q I notice here, Mrs. Manzin, your letter says:

"Receipt is acknowledged of your letter regarding our recent publicity."

Was that recent publicity unfavorable publicity in the paper?

A Yes.

Q And it says further:

"There is a very simple explanation to it, and your sales representative, Mr. Stanley

12 Weiss, who is now our Sales Manager, will
contact you to explain it to you."

Would you tell us, please, if anyone instructed you to give such a letter and, if you know, what the very simple explanation was?

A That particular one, Mr. Byrnes told me there was a simple explanation and told me to have them contact Mr. Weiss, so he could explain it to them.

Q Did Mr. Byrnes tell you what the simple explanation was at that time?

A No, he didn't.

I presumed it was that some customers buy and then they don't want to carry on their contract, you know, and that is why the publicity was there.

MR. NISSEN: We offer, your Honor, 3-2083 from the Gamble Ranch files.

THECOURT: 3-2803 is ordered in evidence.

(Letter marked Plaintiff's
Exhibit 3-2083 was received
in evidence.)

MR. NISSEN: Without reading the entire document, it says:

"Here's an opportunity to get a lot of BLUE
CHIP STAMPS with little or no effort!"

Then it tells how to get Blue Chip stamps by giving the names of customers.

NORMAN T. ROCKEL

THE WITNESS: January 1962.

THE COURT: All right.

THE WITNESS: I feel foolish for that.

THE COURT: It is quite all right. It is quite understandable to get years mixed up, unless you stop to think about it.

THE WITNESS: In the latter part of January there was a news release in three media, TV, radio and also in the newspaper, concerning an announcement that the Gamble Ranch Company would give anyone, in effect, their money back who wished it.

I went into the office that morning and I think it would be reasonable to say the sales people came in kind of early that morning, also.

As soon as Mr. Byrnes came in we asked him what the situation was, particularly Bob Stein and myself.

He said that the news release was not consistent with what had been stated in Nevada, and that the Company would continue to -- in other words, what it should have been was that the Company would continue to follow and pursue their policy that it had previously followed.

That wherever there was any sales misrepresentations found on the part of a salesman, that monies would be refunded to the customer.

1 He also stated, and I would say this would
2 possibly have been about an hour or a half an hour later
3 -- possibly half an hour to an hour later -- that the
4 firm of Wyman, Finell & Rothman would be brought into
5 this matter to handle these requests.

6 Later that morning I was called to Mr. Byrnes'
7 office and was introduced to Mr. Finell, a partner of the
8 firm of Wyman, Finell & Rothman, and told that Mr. Finell
9 would handle all refund matters as a result of this pub-
0 licity that had taken place.

1 Following that, Mr. Finell prepared a question-
2 naire form that, in turn, we reproduced on our own equip-
3 ment there, which was given to each purchaser making a
4 request for refund.

5 These forms, after they were completed by the
6 purchaser, and if the purchasers happened to come into
7 the building they were told, asked to complete it or
8 the forms were mailed to them, and they were returned.

9 The purchasers were told that this would be
0 taken up with our attorneys. And these forms then, in
1 turn, along with the customer's file was taken to Mr.
2 Finell.

3 I remember taking, I think, about two trips
4 and this was an accumulation. I didn't run down every
5 minute of the day.

1 Mr. Finell would go over these forms and
2 determine as to whether refunds were to be made or not.

3 Once he had made the determination, we then,
4 in turn, from the offices of the Company, sent out a
5 form letter to the customer advising him that they were
6 denied their refunds, or in the event refunds were made,
7 why, the money was paid to the customer along with a
8 covering letter.

9 BY MR. NISSEN:

10 Q Now, you mentioned Mr. Byrnes stating, I
11 believe you said, that the policy that had been in ef-
12 fect would continue.

13 A That is correct.

14 Q Upon a showing of misrepresentation the people
15 could get their money back?

16 A That is correct.

17 Q While you were there, sir, what kind of showing
18 was required?

19 In other words, if the purchasers claimed a
20 certain representation was made, what kind of -- did
21 you have a standard proof there, or what did you rely
22 on?

23 A No, --

24 MR. ROTHMAN: I think that question should
25 be directed to Mr. Finell and not to this witness.

THE COURT: He can say what was done. He said they sent out a questionnaire.

I don't know what the questionnaire was or what it asked.

MR. NISSEN: I was not trying to get ahead of Mr. Byrnes' statement.

Q In other words, did he tell you how the purchaser would have to establish the claim of misrepresentation?

A No, --

THE COURT: You mean did Mr. Byrnes tell him that?

MR. NISSEN: Yes, sir.

THE COURT: All right.

THE WITNESS: I would like to clarify the question.

Are you asking me prior to the direction?

THE COURT: What direction?

THE WITNESS: I am talking about the direction I had to take all of these to Mr. Finell.

Are you talking about prior to that point?

BY MR. NISSEN:

Q My question is -- let me tell you exactly what I am talking about.

At the time Mr. Byrnes was talking to you, and

when he said, in effect, "Our policy will continue as it has been in the past", did he tell you what a purchaser would have to do to establish that misrepresentation had occurred?

A No, this was determined, insofar as I was concerned, by the form that Mr. Finell prepared and then Mr. Finell's review of these particular forms.

Q Maybe I can get at it this way: Mr. Byrnes said that the policy was going to continue the same as it had been in the past, sir?

A Yes, I am sorry. Now you are talking actually about before.

What was the policy before this date, is that correct?

Q At that minute and before.

A The policy was such that if we had a customer come in we talked to the customer, I personally talked to the customer.

And there was an adjudication, which again was a matter of opinion with respect to all the facts, and in the event we found there had been misrepresentations --

THE COURT: Who is "we"?

THE WITNESS: I say "we". I say myself and I could discuss this with the sales manager at times and

even the sales people that were involved, and I would also discuss it with Mr. Benaron.

Mr. Reisman was very adamant with respect to the situation of handling this in a very clean-cut manner, and I would discuss these things with Mr. Reisman.

I also discussed them with Mr. Benaron.

THE COURT: Have you answered the question?

THE WITNESS: I hope I have.

THE COURT: All right.

BY MR. NISSEN:

Q In summary, you would talk to the sales person to find out what their story was?

A That is correct, along with the customer.

Q And you would decide --

A I think it would be fair to say that I would make an initial determination, and realizing that I was, in effect, spending money of the Company, as a matter of automatic policy I took it up with the principals. I referred it and told them what my recommendations were.

Q All right, sir.

MR. NISSEN: We have here a file marked 3-307, which is a Gamble Ranch refund request file, your Honor, and we will offer it at this time so I might ask him a question about it.

THE COURT: 3-307 is ordered in evidence.

(File marked Plaintiff's
Exhibit 3-307 was re-
ceived in evidence.)

BY MR. NISSEN:

Q Without going through the entire file,
Mr. Rockel, there is a small note from Bob Finn to Norm
Rockel with the received stamp of February 5, 1962 on
it, and Mr. Finn says in part to you;

"Here's another of the Jaffee pattern.

"He promised this man a job if he bought.

The man was ready to sell his house, and move
up to the Ranch with all his heavy duty con-
struction equipment, which totaled about
\$100,000. He was also planning to build
a home on his property.

"The job he mentioned, as promised by
Jaffee, was road construction. He said,
that Jaffee never got back to him on any
of the promises he made.

"This guy turned real sour on Gamble
Ranch. It wasn't misrepresentation on the
part of Gamble Ranch, but misrepresentation
on the part of Jaffee."

I call your attention to the first line there,

"Here's another of the Jaffee pattern."

While you were there, sir, did you notice any pattern on the part of Mr. Jaffee that indicated he sometimes went --

A Yes, I would say that Jaffee as a salesman in situations like this caused problems, so there was a pattern.

Q And had you, sir, questioned Mr. Jaffee from time to time about complaints from customers?

A Yes.

Q And did Mr. Jaffee admit or deny to you he made such misrepresentations?

A Jaffee as an individual was a rather peculiar person. He could open his mouth up, in effect, with respect to these things and say nothing.

As a result of it, after I went through an exposure like this I really didn't what I consider tackle him any more on these matters.

In other words, I considered that Jaffee tended to double talk himself around a situation like this.

Q All right. But in your customary policy you did interview him or question him when a complaint arose?

A Yes.

Q You would also question the purchaser?

A Yes.

1 Q Contact them.

2 Did you recommend or whatever you said you
3 did, pass this on to the principals, Mr. Benaron, Mr.
4 Byrnes, Mr. Reisman from time to time?

5 A Yes.

6 MR. ROTHMAN: Pass what on?

7 MR. NISSEN: The fact that Mr. Jaffee said one
8 thing and the customer said another.

9 THE WITNESS: Let me again try to make a point
0 which I haven't made very clear.

1 I would take and confront Jaffee with a par-
2 ticular situation that a customer made, but as far as
3 I was concerned -- this is a matter of my own personal
4 opinion, that is true, -- but I thought that Jaffee would
5 tend to avoid ²direct answer to my question.

6 Therefore, I could not, in the way, at least,
7 that I feel with people I could not understand what really
8 happened from him.

9 THE COURT: Did you take it up with anyone
0 else, with Mr. Benaron or anybody?

1 THE WITNESS: Yes, I would communicate the
2 facts of the situation onto the principals.

3 THE COURT: All right.

4 BY MR. NISSEN:

5 Q After this newspaper article and after Mr.

is merely some sales material you are passing on, isn't that correct?

A In our progressive review of our sales literature, yes.

Q This is the discontinuance of the Nevada Ranch Service letter?

A Yes, that is the discontinuance.

Q Let's go on, if we may. I am now in October of 1961, and I want to stop on this letter for a little while, if I may.

October 9, 1961, 1-543. Here is some correspondence between you and Mr. Reisman dealing with some complaints, is that correct?

A I haven't seen this letter.

Q I am sure you haven't. The letter says:

"Please be advised that I have just received three letters or notices of complaints with respect to Gamble Ranch Development Corporation Sales".

A That is correct.

Q Mr. Reisman is advising you that he, Mr. Reisman, has received three complaints from customers, is that correct?

A That is correct.

Q You will note this letter is a letter that was

written before the procedure was set up with Mr. Finell, as it related to the handling of cusomter complaints?

A That is right, that was before.

Q I take it that before that program was set up with Mr. Finell in 1962, any customer complaints that may have come to the attention of Gamble were handled through Mr. Reisman's office?

A No, that is not correct.

Q You correct me then.

A Complaints were handled -- and I testified earlier to this -- some complaints were handled with Reisman's office.

I personally, along with questioning the sales people and communicating with the customer, either through a meeting with the customer or by correspondence, adjudicated certain of the complaints and made decisions and then, in turn, that is based on the -- what I called initial decision that I made.

I passed it then along to the principals of the Company, as to what, in effect, should be finally done.

Q I think that answers it. I am sure it does.

On these complaints of 1-543 that Mr. Reisman sent to you, you reviewed them and made your comments and advised in one case there should be a refund. That

